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al., 4:21-cv-04333-DMR

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19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**

21 IN RE: FACEBOOK, INC. CONSUMER
22 PRIVACY USER PROFILE LITIGATION

MDL No. 2843
Case No.: 18-md-02843-VC-JSC

23
24 **PLAINTIFF'S RESPONSE IN**
OPPOSITION TO FACEBOOK PROFILE
LITIGATION PLAINTIFFS'
ADMINISTRATIVE MOTION TO
RELATE CASES

1 Madeline Kiss (“Kiss”), plaintiff in *Kiss v. Flo Health, Inc. et. al*, No. 3:21-cv-04333-JD
 2 (the “Kiss Action”), which is pending in this District before Judge Donato, opposes the motion of
 3 Plaintiffs in the above-captioned action to relate the Kiss Action to *In re: Facebook, Inc. Consumer*
 4 *Privacy User Profile Litigation*, No. 3:18-cv-02843 (“Facebook Profile Litigation”) (the “Motion”).
 5 The Kiss action concerns fundamentally different claims, brought on behalf of a different class (*i.e.*,
 6 users of Flo Health’s mobile app), arising from different alleged misconduct (*i.e.*, Flo’s unauthorized
 7 sharing of information it collected from users with various digital advertising companies), against a
 8 different group of 5 defendants, 80% of which have nothing to do with Facebook. Given these
 9 distinctions, the Kiss Action cannot qualify as related to the *Facebook Privacy Litigation* under L.R.
 10 3-12(a). It is no surprise then that Defendant Facebook—the sole overlapping party between the
 11 cases, and entity that allegedly engaged in the “related” misconduct—also opposes Plaintiff’s
 12 Motion. For these reasons, and those below, the Motion should be denied.
 13

14 I. BACKGROUND

15 The *Facebook Profile Litigation* plaintiffs strain to connect the Kiss Action to the facts and
 16 claims at issue in their case, many of which are inactive, having been dismissed or “paused”
 17 pending further review. As demonstrated below, other than Facebook being a named defendant in
 18 both actions, there are few similarities.

19 **Different Facts:** *Facebook Profile Litigation* arose in the wake of the Cambridge
 20 Analytica scandal. See ECF No. 148. Plaintiffs there allege that Facebook “impermissibly
 21 collected and curated [**Facebook users’**] content and information and then sold access to this
 22 information to thousands of third parties without Plaintiffs’ knowledge or consent,” allowing
 23 third-party data brokers and others to de-anonymize Facebook users’ content and individually link
 24 it to Plaintiffs in violation of their privacy rights. See Second Amended Consolidated Complaint
 25 (“*Facebook Profile SAC*”). ECF No. 491 at ¶ 694. The Kiss action alleges something entirely
 26 different: that app developer Flo Health improperly collected and shared **Flo App users’** personal
 27 health data with various online advertiser, including Facebook, Google, LLC, Appsflyer, Inc., and
 28 Flurry, Inc. See Kiss Action, ECF No. 1 (“*Kiss Complaint*”) ¶ 43. This has little to do with

1 Facebook’s “collection” and “curation” of Facebook users’ “content and information,” including
 2 posts, likes, and pictures—the gravamen of the *Facebook Profile Litigation*—or the improper de-
 3 anonymization of users’ Facebook data, and other misconduct allegedly engaged in by Facebook
 4 with regards to its users’ data. Indeed, the *Facebook Profile* SAC makes only one passing
 5 reference to Flo Health (*Facebook Profile* SAC at ¶ 261) as an app that sent data to Facebook.
 6 However, the irrelevance of this reference to the litigation is confirmed by the fact that the
 7 complaint does not assert claims against Flo Health or name it as a defendant, co-conspirator, non-
 8 prioritized defendant, or interested party in the action. *See Facebook Profile* SAC ¶¶ 212-28.

9 **Different Claims & Classes:** Given the differences between the facts underlying the
 10 *Facebook Profile Litigation* and the *Kiss Action* it is not surprising that, while the two complaints
 11 assert similar causes of action, there is *no* overlap in their claims. For example, while the one
 12 prioritized cause of action to survive motions to dismiss in *Facebook Profile Litigation*—unjust
 13 enrichment—is also asserted against Facebook (along with 4 other advertiser defendants), the
 14 theory of liability is fundamentally different with the *Kiss Action* alleging that defendants
 15 (generally) were enriched by *receiving* Plaintiff Kiss’s and other Flo App users’ data (*see Kiss*
 16 Complaint ¶¶ 221-22) and the *Facebook Profile Litigation* focusing on *Facebook’s sale* of data
 17 associated with *Facebook’s users* to third parties. *See Facebook Profile* SAC ¶¶ 983-84. Similar
 18 issues exist with the other claims asserted in the *Facebook Profile Litigation*, which focus on
 19 Facebook’s conduct in selling user data, unrelated to any acts by Flo Health or the other
 20 defendants in the *Kiss* action. These differences are only compounded by the discrepancies
 21 between the proposed class definitions: a class of Flo App users between 2016 and present, on the
 22 one hand (*see Kiss* Complaint ¶ 155) and U.S. and U.K. Facebook users between 2007 through
 23 present on the other. *See Facebook Profile* SAC ¶ 764.¹

24 **II. ARGUMENT**

25
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¹ To the extent there is any overlap in class membership, neither the *Facebook Profile Litigation* or
 27 *Kiss Action* complaint allege it, making the issue premature. *See Argument, Part II.B., below.*

L.R. 3-12(a) allows relation when “(1) [t]he actions concern substantially the same parties, property, transaction, or event; and (2) [i]t appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different judges.” A movant must establish that both criteria are satisfied. L.R. 3-12(a), (d). The *Facebook Profile Litigation* plaintiffs fail to establish either criteria. Thus, the Motion should be denied.

A. The Actions Are Not Substantially Similar.

The *Facebook Profile Litigation* plaintiffs’ claim that these cases involve substantially similar issues of fact and law (Motion at 2) is meritless, and overlooks several key differences between the actions in trying to force the application of L.R. 3-12(a). Critically, the *Facebook Profile Litigation* and *Kiss Action*, assert different claims, arising from different misconduct, against a different group of defendants, on behalf of two very different classes. See Section I., above. These facts—on their own—are enough to deny the Motion.

To the extent there are similar *types* of claims asserted in the two actions, any overlap is in name only, with the underlying theory of liability (and thus relevant discovery) being different. For example, while this Court’s September 9, 2019 Order Granting in Part and Denying in Part the Motion to Dismiss the First Amended Complaint sustained the *Facebook Profile Litigation* plaintiffs’ claim for unjust enrichment (ECF No. 298 at 21), the basis for that claim—Facebook’s *sale of its users’ data* to third parties (*see Facebook Profile SAC ¶¶ 983-84*)—is fundamentally different from the unjust enrichment claim asserted in the *Kiss* action, which alleges that defendants, including Facebook, were unjustly enriched by their *receipt* of Flo data, **regardless of whether it was ever sold**. *See Kiss Complaint ¶¶ 221-22.*

Similarly, while the complaints in both actions might include a claim for violation of California’s Unfair Competition Law (“UCL”), these claims differ substantially because the “unfair,” “unlawful,” or “fraudulent” conduct allegedly giving rise to a UCL violation is different. The UCL claim in *Facebook Profile Litigation* allegedly arises from Facebook’s sharing of users’ profile content to third parties. *See Facebook Profile SAC ¶ 918.* By contrast, the *Kiss* Action does

1 not make any allegations about users' Facebook profiles or Facebook data, but alleges that
 2 Facebook violated the UCL when it received personal medical information about Flo App users.
 3 *Kiss* Complaint ¶ 259. Likewise, while both *Facebook Profile Litigation* and the *Kiss* Action
 4 include claims arising from alleged privacy violations, the "invasion of privacy-intrusion into
 5 private affairs claims" asserted in *Facebook Profile Litigation* at Claim IV is unrelated to the *Kiss*
 6 Action's common law invasion of privacy-intrusion upon seclusion claims, which is based on
 7 Facebook's aiding and abetting of *Flo Health*'s violations of law.

8 The *Facebook Profile Litigation* plaintiffs strain to manufacture an overlap in the Wiretap
 9 Act claim asserted by each complaint. Motion at 4. However, even the most cursory review
 10 establishes that these claims are distinct, with *Facebook Profile Litigation* basing the alleged
 11 violation on Facebook's *disclosure* of Facebook users' electronic communications to unauthorized
 12 parties (see *Facebook Profile* SAC ¶ 798), and the *Kiss* Action relying on defendants' unlawful
 13 *interception* of intimate health data from the Flo App. *Kiss* Complaint ¶¶ 302-05.

14 Claims for violation of the California Invasion of Privacy Act are similarly distinguishable.
 15 While the *Facebook Profile Litigation* plaintiffs' claim concerns Facebook's harvesting of
 16 Plaintiffs' **location data** to third parties (*Facebook Profile* SAC ¶¶ 1210, 1213) the *Kiss* Action
 17 alleges no such thing, relying (as with the Wiretap Act claim) on the unlawful interception of
 18 Plaintiff Kiss's intimate health data. *Kiss* Complaint ¶ 310. The claims asserted under California's
 19 Computer Data Access and Fraud Act are just as different, turning on Facebook's allegedly
 20 unauthorized access to Plaintiff's personal computers in *Facebook Profile Litigation* (*Facebook*
 21 *Profile* SAC ¶ 1228) compared to Flo Health's alleged violation of the statute by knowingly
 22 providing the advertiser defendants access to intimate health data Flo Health collected from
 23 Plaintiff Kiss and other users of its app without permission. *Kiss* Complaint ¶ 320.

24 Given these significant differences, the *Facebook Privacy Litigation* Plaintiffs cannot
 25 demonstrate a substantial similarity exists among the actions, as required under L.R. 3-12(a)(1).
 26 The *Facebook Privacy Litigation* Plaintiffs' conclusory assertions that the actions raise
 27

1 substantially similar issues of fact and law fail as a matter of law. See, e.g., *ASUS Computer Int'l*
2 v. *Interdigital, Inc.*, 2015 WL 13783764, at *1 (N.D. Cal. June 15, 2015) (finding actions not
3 related despite a common defendant and nearly identical agreements, as the cases involved
4 different parties, agreements, and claims); *Hill v. Goodfellow Top Grade*, 2019 WL 2716487, at
5 *1 (N.D. Cal. June 28, 2019) (denying relation of two cases against the same defendant, with
6 overlapping employment periods, events and witness because the cases “concern[ed] largely
7 different events”). Further, to the extent there is any potential for overlap among class members
8 between the two actions, this issue is not only premature, as no such overlap is plead in either
9 complaint, but irrelevant as it would not satisfy L.R. 3-12 in light of the significant differences
10 already explained above. *Ortiz v. CVS Caremark Corporation*, 2013 WL 12175002, at *1 (N.D.
11 Cal. Oct. 15, 2013) (“[T]he limited overlap of some class members is not enough to reach the
12 ‘substantial similarity’ threshold.”)

B. Relation Would Not Create Efficiencies.

The *Facebook Profile Litigation* plaintiffs do not even attempt to argue that the second prong of L.R. 3-12(a) is satisfied beyond their conclusory statement that given the factual and legal similarities between the actions, relation is proper to prevent unduly burdensome duplication of labor and expense or conflicting results. Motion at 4. However, a cursory review of the complaints indicates case-specific factual issues and reveals that no efficiencies would be gained by relation of the two cases. Any minimal commonalities between the two cases fail to satisfy L.R. 3-12(a)(2)'s relation standard. Differing discovery issues can bar relation of cases even if the central legal question is identical, which is not true here, based on the different parties, different property, different alleged misconduct, and few overlapping claims.

III. CONCLUSION

The Motion to Relate should be denied.

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